UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **JOHN W. SYKES,** and **MELISSA L. SYKES**, Debtors.	Case No. **02-30076-13**
JOHN W. SYKES, and **MELISSA L. SYKES**, Plaintiffs. -vs- **OCWEN FEDERAL BANK FSB** and **WACHOVIA BANK, NA**, Defendants.	Adv No. **04-00109**

M E M O R A N D U M OF DECISION

At Butte in said District this 17th day of June, 2005.

On May 31, 2005, Defendants, through their counsel, Charles J. Peterson and Matthew R. Kolling of the Mackoff, Kellogg Law Firm of Dickinson, North Dakota, filed a motion for summary judgment, together a statement of uncontroverted facts and brief. On June 13, 2005, Plaintiffs, through their counsel, Harold V. Dye, of Dye & Moe, P.L.L.P., of Missoula, Montana, filed their opposition to the motion for summary judgment together with a statement of disputed facts filed on June 14, 2005 and requested a hearing on July 7, 2005, the same day that this adversary proceeding is scheduled for trial. On June 15, 2005, Defendants filed a reply to the

opposition filed by the Plaintiffs. Although the motion for summary judgment and the opposition thereto is scheduled for hearing on July 7, 2005, the Court concludes that the matter is ripe for decision so the trial may proceed on July 7, 2005. The Court notes that Defendants' filed on July 17, 2005, a motion to continue trial, given the pending motion for summary judgment. Defendants' motion to continue, doc. # 15, is denied herein. As set forth herein, Defendants' motion for summary judgment is denied and the hearing on the motion for summary judgment is vacated; this adversary proceeding shall proceed to trial on July 7, 2005, at 9:00 a.m. in Missoula as scheduled by prior Order.

Plaintiffs submitted the following statement of undisputed facts:

> On or about October 14, 1997, the Plaintiffs took out a mortgage loan for the purchase of certain real property located in Lake County, Montana. The mortgage loan was evidenced by a Promissory Note and Deed of Trust signed by the Plaintiffs. Plaintiffs' Answer to Request for Admission No. 1; Defendants' Aff., ¶ 3.
>
> Defendant Wachovia Bank, NA f/k/a First Union National Bank is the current holder of the beneficial interest under the Note and Deed of Trust. Defendant Ocwen Federal Bank, FSA, is the current servicing agent for the Note and Deed of Trust. Defendants' Aff., ¶ 3.
>
> The Note and Deed of Trust required the Plaintiffs to make regular monthly payments of principal and interest until the Note was fully paid. However, Plaintiffs failed to make their regular monthly payments. Accordingly, Defendants declared a default under the terms and conditions of the Note and

Deed of Trust and proceeded to exercise their state law foreclosure remedies. On August 31, 2001, a Notice of Trustee's Sale was issued, setting a trustee's sale date of January 24, 2002. Plaintiffs' Answer to Request for Admission No. 4, 5; Defendants' Aff., ¶ 4.

On January 14, 2002, ten days prior to the scheduled trustee's sale, Plaintiffs filed for bankruptcy. At the time of the bankruptcy filing, the Defendants claimed pre-petition arrearages of $16,645.81 and filed a Proof of Claim in this amount on February 19, 2002. Plaintiffs' objected to Defendants' Proof of Claim, and requested that an amount of $2,412.50 in Defendants's pre-petition legal fees and costs be disallowed as a part of Defendants' Proof of Claim. The Court granted Plaintiffs' objection. Subsequently, an amount of $2,412.50 in fees and costs was removed from Defendants' records on Plaintiffs' Note and Deed of Trust. Defendants' Aff., ¶ 5.

The Court later confirmed Plaintiffs' Chapter 13 plan. The plan provided that Plaintiffs would pay their pre-petition arrearages to Defendants through their Chapter 13 plan. According to the terms of the plan, the Plaintiffs were to pay a total of $14, 233.31 to Defendants over a period of forty-four months to cure their pre-petition arrearages. Plaintiffs' Answer to Request for Admission No. 6, 7; Defendants' Aff., ¶ 6.

In addition to curing pre-petition arrearages, however, Plaintiffs also were obligated to make all post-petition payments due on the Note and Deed of Trust directly to Defendants. Plaintiffs failed to make their required post-petition

payments. Plaintiffs' Answer to Request for Admission No. 8, 9. On November 3, 2003, Defendants moved to modify the automatic stay pursuant to 11 U.S.C. § 362. Defendants' Aff., ¶ 7.

At the time the motion was filed, the Plaintiffs were in arrears for three post-petition payments. The Plaintiffs did not deny failing to make the post-petition payments. Instead, the parties entered into a stipulation resolving the motion to modify stay. The Stipulation was signed by the Debtors' attorney on December 10, 2003, and was accepted by the Court. Plaintiffs' Answer to Request for Admission No. 10, 11, 12; Defendants' Aff., ¶ 8.

In the Stipulation, the Plaintiffs admitted that they were in default in the amount of $2,484.72. Plaintiffs' Answer to Request for Admission No. 13. The Plaintiffs agreed to pay $1,859.20 to Ocwen by January 15, 2004 and to pay all post-petition late charges upon a judicial determination that they were due and owing. Plaintiffs' Answer to Request for "Admission No. 14. Plaintiffs also agreed to make all future post-petition payments as required under the terms of the note and Deed of Trust. Paragraph 4 of the Stipulation further provided as follows:

> any failure by the Debtor(s) to timely perform any obligation hereunder shall constitute a default by the Debtor(s). In the event of a default by the Debtor(s), Wachovia Bank, NA f/k/a First Union National Bank, as Trustee, shall be entitled to proceed to immediately exercise its remedies in seeking foreclosure and liquidation of the collateral described in the Motion filed by Wachovia Bank, NA f/k/a First Union Bank, as Trustee, without further notice to Debtor(s) or Motion to Modify Stay or Order Modifying Stay from the Bankruptcy Court. In the event of a

> default by the Debtor(s) under this Stipulation and Agreement, Wachovia Bank, NA f/k/a First Union Bank, as Trustee, shall not be further required to obtain additional relief from the bankruptcy automatic stay and may proceed directly to exercise its remedies available under this agreement and under state law.

Accordingly, the Stipulation provided that if the Plaintiffs failed to perform any of the obligations of the Stipulation, Defendants could immediately proceed with their state law foreclosure remedies, without the necessity of seeking further relief from stay from the bankruptcy court. Defendants' Aff., ¶ 9.

Although the Stipulation required the Plaintiffs to pay Defendants $1,859.20 by January 15, 2004, the Plaintiffs did not make the payment by that date. Plaintiffs' Answer to Request for Admission No. 16. Therefore, Defendants proceeded with their state law foreclosure remedies, without reapplying to the bankruptcy court for modification of the stay. This course of action was explicitly authorized under the terms of the Stipulation. Under the terms of the Note and Deed of Trust, and the Stipulation signed by the parties, partial payment of the mortgage was no longer acceptable. Defendants' Aff., ¶ 10.

However, in between December 10, 2003, when Plaintiffs signed the Stipulation, and January 15, 2004, when Defendants did not receive the payment due from the Plaintiffs, the Plaintiffs had changed plans. On December 12, 2003, the Plaintiffs filed a motion for an early payoff of their Chapter 13 plan. Plaintiffs proposed to take on new debt to pay off the remainder of their plan payments. The Debtors' motion for an early payoff was granted on December 29, 2003. Defendants' Aff., ¶ 11.

At this point, things became confusing for the Defendants. The Plaintiffs had not paid the amount due from them under the terms of the Stipulation. Accordingly, the terms of the Stipulation granted Defendants relief from stay and authorized them to proceed under state foreclosure law and reject partial payment of the amount due on the Note and Deed of Trust. At the same time, the Plaintiffs were authorized by the court to make an early payoff of their Chapter 13 plan. Defendants' Aff. ¶ 12.

On or about March 29, 2004, the Plaintiffs paid the trustee the remainder of the amount due under their Chapter 13 plan. Thereafter, the trustee forwarded to Defendants a check in the amount of $6,063.00, the amount remaining to be paid to Defendants under the plan. However, when the trustee's check was received by Defendants, the Defendants' records for the Note and Deed of Trust showed the mortgage loan as being in foreclosure, and that partial payment of the amount due on the loan was no longer acceptable. Accordingly, Defendants mistakenly returned the trustee's check as being insufficient to pay in full the amount then due on the loan. Defendants unintentionally construed the trustee's check to be a partial tender of the amount due on the Note and Deed of Trust, rather than a pre-payoff of the Chapter 13 plan. Defendants' Aff., ¶ 13.

After the trustee's check was returned to the trustee, the trustee filed an objection to Defendants' Proof of Claim. The trustee stated that since Defendants were proceeding with state law foreclosure remedies, Defendants should not be paid through the plan. The trustee recognized, however, that pursuant to the terms

of the Stipulation, Defendants were authorized to proceed with state law foreclosure remedies. In the objection, the trustee stated as follows:

> [Defendant] Ocwen Federal Bank has returned the funds sent to it pursuant to the terms of the confirmed Chapter 13 Plan stating that the Debtors defaulted on consent/APO order. Ocwen Federal Bank has stated its intention, by virtue of this letter, to stop accepting payments made pursuant to its allowed claim and the terms of the Chapter 13 Plan.

Although the trustee stated that Defendants' exercise of state law foreclosure remedies might be an "administrative burden," the trustee did not seek sanctions. Defendants' Aff., ¶ 14.

At the same time, however, Plaintiffs had brought a separate motion to compel Defendants to accept the funds tendered by the trustee and to deem their loan account current. Defendants did not respond to the Plaintiffs' motion to compel, and accordingly, the motion to compel was granted by the Court on June 4, 2004. Defendants' Aff., ¶ 15.

After the order to compel payment was issued, Defendants were made aware of their unintentional mistake of returning the trustee's check. Although the trustee brought a separate motion for sanctions against Defendants, the Defendants informed the trustee, that they would accept the tendered funds, and the trustee's motion for sanctions was withdrawn. Defendants' Aff., ¶ 16.

Thereafter, the trustee reissued the check to Defendants. The trustee's check was then promptly accepted by Defendants and applied to the Plaintiffs' loan account. The total delay in accepting the funds sent by the trustee was from

March 31, 2004, when the trustee's check was first issued, to July 19, 2004, when it was accepted and applied by the Defendants. At most there was only this relatively short delay in applying the trustee's check to the Plaintiffs' pre-petition arrearages. Moreover, upon acceptance of the funds tendered by the trustee, Defendants are fully in compliance with all the Court's orders in this matter. Defendants' Aff., ¶ 17.

The Plaintiffs set forth the following disputed facts:

There is a material fact of whether Defendant's *in fact* applied the trustee's payment to Plaintiffs account. There is no doubt that Ocwen cashed the check but where is the confirmation that the payment was applied to the pre-petition arrearage as required by the plan and the order confirming the plan? In this regard, the Court should review Exhibits 7 and 8 which are the account statements for June 25, 2004 and April 18, 2005 respectively. In each case the principal balance is the same which would not be the case if the trustee payment was applied to pre-petition arrearages. Given that there is substantial evidence that Defendants were improperly attempting the assess Plaintiffs with "Bankruptcy Expense"; "Legal/Collection Expense" and "Property Valuation Expense" which were either the subject of the Court's order of March 20, 2003 which disallowed such items in Defendant's proof of claim *or* were attempting to collect such charges without an application as required by L.B.R. 2016-1(d), there is a reasonable inference that Defendants applied the trustee's payment to such charges.

Along this same line, there is an issue of whether Defendants violated the March 20, 2003 order or the orders confirming the plan and confirming two modifications of the plan (orders of July 2, 2003, September 8, 2003 and December 29, 2003) all of which would have incorporated the provisions of L.B.R. 2016-1(d). The various Account Statements and Notice of Default (Exhibits 1 -10; 13 - 15) plainly show Defendants assessing "Bankruptcy Expense"; "Legal/Collection Expense" and "Property Valuation Expense" on an ongoing and escalating basis. The Court can judicially notice that no application for over secured creditors fees and costs as required by L.B.R. 2016-1(d) was ever filed by Defendants.

There is an issue of fact of whether Defendants violated the Court's order of June 4, 2004 which ordered them to accept the trustee's tender of plan payments and also ruled that the loan was not in default. By Defendants own admission they did not accept the tendered plan payments until after the Trustee filed a motion to hold them in contempt for violating he June 4 order. While Defendants *claim* that they complied with this order on July 18, 2004, on August 13, 2004 Defendants refused Plaintiff's payment because the amount tendered was "insufficient to cure the defaulted amount of your loan." Exhibit 16. The letter when (sic) on to state that "The actual amount of the default was addressed in the Demand Letter previously forwarded to you." The "Demand Letter" addressed in Exhibit 16 was in fact the Notice of Default dated June 2, 2004. Exhibit 15. That notice was issued before the June 4 order and (of course) long before Defendants supposedly purged their contempt by "posting" the trustee's

check on July 19, 2004. Defendants still used the June 2 Notice of Default as pretext for refusing payment. Exhibit 15 shows Defendants contempt for this Court in other ways as well.

- The Notice demands that Plaintiffs pay amounts that were the subject of the trustee's tender of pre-petition payments which Defendants were obligated under the plan and order confirming the plan to accept.
- The Notice demands that Plaintiffs pay $4,748.41 in "Other Advances" which are in fact attorneys fees, costs and simpler expenses which were either disallowed by the order of March 20, 2003 or were improperly assessed without an application as required by L.B.R. 2016-1(d) .

Finally, even assuming that the posting on July 19, 2004 constituted a compliance with the June 4 order, Plaintiffs are still entitled to compensatory damages for Defendants failure to comply with prior court orders. Defendants were bound by the order of December 29, 2003 which modified the confirmed plan to allow early plan payoff and were therefore obligated to accept the trustee's payment of pre-petition arrearages. They (admittedly) did not do so. They continued to assess Plaintiff interest on the monies tendered by the trustee as well as late and other charges. See Exhibits 4 - 8; 13 - 15. In addition, Plaintiffs incurred attorneys fees to file a motion to compel Defendants to accept the trustee's payment.

APPLICABLE LAW

A. Standard For Summary Judgment

Summary judgment is governed by F.R.B.P. 7056. Rule 7056, incorporating F.R.Civ.P. 56(c), states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Notwithstanding, "[t]he proponent of a summary judgment motion bears a heavy burden to show that there are no disputed facts warranting disposition of the case on the law without trial." *Younie v. Gonya (In re Younie)*, 211 B.R. 367, 372 (9th Cir. BAP 1997) (quoting *In re Aquaslide "N" Dive Corp.*, 85 B.R. 545, 547 (9th Cir. BAP 1987), *aff'd* 163 F.3d 609 (9th Cir. 1998). Once that burden has been met, "the opponent must affirmatively show that a material issue of fact remains in dispute". *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir.1985). That is, the opponent cannot assert the "mere existence of some alleged factual dispute between the parties." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Instead, to demonstrate that a genuine factual issue exists, the objector must produce affidavits which are based on personal knowledge. *Aquaslide*, 85 B.R. at 547. Additionally, the facts set forth therein must be admissible into evidence. *Id*. To prevail on a motion for summary judgment, the moving party must first identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischback & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir. 1986), *cert. denied*, 469 U.S. 949,

107 S.Ct. 435, 93 L.Ed.2d 384 (1986). As explained by the U.S. Supreme Court, a mere "scintilla" of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that a jury could reasonably find for that party. *Anderson*, 477 U.S. 242. All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson*, 477 U.S. 242. Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.*, 809 F.2d at 630 (citing *Anderson*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id*.

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Thus, the Court's ultimate inquiry is to determine whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *T.W. Elec. Serv.*, 809 F.2d at 631.

B. Civil Contempt and Sanctions.

A remedy for civil contempt arises under 11 U.S.C. § 105. An entity may seek relief through this remedy. By definition, "entity" includes person, estate, trust, governmental unit, and United States Trustee. § 101(15). A "person" includes an individual, a partnership, a corporation and a governmental unit, only when it acquires an asset from a person, as a result of

loan guarantee agreement, or as a receiver or liquidating agent of a person. § 101(41). Damages under civil contempt are permissive, not mandatory. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190 (9th Cir. 2003); and *Eskanos & Adler, P.C., v. Roman (In re Roman)*, 283 B.R. 1, 14 (9th Cir. BAP 2002). Civil contempt requires "willfulness," not bad faith or subjective intent. Willfulness dovetails with the elements of knowledge and intentional action of 11 U.S.C. § 362(h). *Dyer*, 322 F.3d at 1191, *citing Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995), and *Pinkstaff v. United States (In re Pinkstaff)*, 974 F.2d 113, 115 (9th Cir. 1992). The aggrieved party has the burden of establishing a clear and convincing evidentiary basis for civil contempt, *Dyer*, 322 F.3d at 1191, whereas an aggrieved party under 11 U.S.C. § 362(h) only has a preponderance burden. *In re Flack*, 239 B.R. 155, 162-63 (Bankr. S.D. Ohio 1999). *See also In re Rainwater*, 233 B.R. 126, 155 (Bankr. N.D. Ala.1999).

"The standard for finding a party in civil contempt is well settled: The moving party has a burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *Dyer*, 322 F.3d at 1190-91, *citing Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002). "The burden then shifts to the contemnors to demonstrate why they were unable to comply." *Bennett*, 298 F.3d at 1069. The moving party must prove that the contemnors (1) knew of the order that contemnors violated and that it was applicable, and (2) intended the actions which violated the order. *See Bennett*, 298 F.3d at 1069. A contemnors' inability to comply with a judicial order constitutes a defense to a charge of civil contempt. *See United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) ("While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the

court has any reason to proceed with the civil contempt action."). However, the contemnor may not be able to use such defense if the inability to comply is self-induced. *See F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir 1999).

What damages and sanctions are available under civil contempt? Compensatory damages, attorneys' fees and costs, and offending creditor's compliance are permissible. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). A panel of the 9th Circuit in *Dyer* recently concluded that, a bankruptcy court in considering civil contempt can only consider civil sanctions, not punitive sanctions, which the panel equated to criminal sanctions. *Dyer*, 322 F.3d at 1192-93. The panel in *Dyer* does distinguish between "relatively mild noncompensatory" fines and "serious criminal" penalties. *Dyer*, 322 F.3d at 1193-94.

The court may also use its inherent sanction authority. *Id*. at 1196. *See also Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996). Inherent sanction authority provides a remedy to control, deter and provide compensation for improper litigation tactics arising beyond the violation of a specific order associated with civil contempt, *Dyer*, 322 F.3d at 1196, and may be imposed by the court sua sponte provided due process exists, *Fjedlsted v. Lien (In re Fjeldsted)*, 293 B.R. 12, 27 (9th Cir. BAP 2003). To impose sanctions under this remedy, explicit findings of bad faith or willful misconduct must be made by the court. *Id.* "'. . . [W]illful misconduct' carries a different meaning than the meaning employed in the context of determining whether an individual is entitled to . . . a contempt judgment under § 105(a) . . . ." *Id.* A court must find specific intent or other conduct in bad faith or conduct tantamount to bad faith, i.e., something more egregious than mere negligence or recklessness. *Id.* Punitive damages are not permissible. *Id.* at 1197. *See, e.g., In re DeVille*, 280 B.R. 483, 494-98

(9th Cir. BAP 2002), *aff'd, Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 551 (9th Cir. 2004).

C. Timeliness of filing Plaintiffs' response.

In the reply filed by Defendants, the timeliness of the Plaintiffs' opposition is questioned. Under the 10-day rule, an additional 3 days are added pursuant to F.R.B.P. 9006(f). Whether service is by mail or electronically under Fed. R. Civ. P. 5(b)(2)(D), three days are added to the prescribed time period.

DISCUSSION

The Court will initially dispose of the timeliness issue raised by Defendants' reply to Plaintiffs opposition pleading. Defendants filed their motion for summary judgment on May 31, 2005, which included the 10-day notice required for motions to modify stay, not the more general 10-day notice required for general motions, including motions for summary judgment, imposed under Mont. LBR 9013-1, as incorporated in Mont. LBR 7056-1. This Court concludes that Plaintiffs were given 10-days to respond under the local rule, even though the incorrect form of notice was used. Plaintiffs filed their opposition pleading on June 13, 2005. The 10-day period expired on June 10, 2005. Such prescribed time period was extended by 3 days pursuant to the mandate of F.R.B.P. 9006(f), which incorporates Fed. R. Civ. P. 5(b)(2)(D) involving electronic service. Whether service is by mail or electronic means, 3 days are added to the prescribe 10-day period. Practitioners should note that the proposed civil and bankruptcy rules to be adopted on December 1, 2005, unless Congress amends the proposed rules, will amend Fed. R. Civ. P. 6(e) and F.R.B.P. 9006(f) to read in pertinent part: ". . . three days are added after the prescribed period." The current rules read: ". . . three days shall be added to the prescribed period." In adding three days to the 10-day period, Plaintiffs had through June 13, 2005 to file their

response. Plaintiffs opposition pleading was timely filed on June 13, 2005, at 2:48 p.m. Defendants timeliness objection is overruled.

The Court next considers Defendants' motion for summary judgment and whether no genuine issue of material fact exists entitling Defendants to summary judgment as a matter of law. The Court has reviewed Defendants statement of uncontroverted facts set forth above, together with Plaintiffs' statement of disputed facts and the exhibits, affidavits and the Court docket and pleadings and orders contained therein.

In Defendants' statement of uncontroverted facts, which adopts ¶ 12 of Defendants' Affidavit, Defendants stated ". . . things became confusing for the Defendants." This statement indicates that questions of fact and possible questions of law existed as to whether the stipulation or the early payoff order was effective. Yet Defendants made no inquiry with the Court as to which may govern. Subsequently, Defendants returned the trustee's check. Was the return of the check mistaken? Did the Defendants unintentionally misconstrue the trustee's check to be a partial tender or a pre-payoff? Where these actions inadvertent? Willful? In bad faith? Before conclusions can be reached as to the nature of Defendants' actions, questions of fact exist as to what occurred during the time sequence between December 2003 and July 19, 2004. Defendants would like this Court to conclude that the Defendants' actions were mistaken, unintentional, inadvertent, but these words require this Court to consider the facts during the stated time sequence to determine if truly Defendants' actions were mistaken, unintentional, inadvertent. Such words, without more, compel this Court to consider the facts to determine if such actions require that this Court reach Plaintiffs' conclusions.

The Plaintiffs have a significant burden in establishing clear and convincing facts that

warrant sanctions within the requirements discussed above. However, this Court will allow Plaintiffs that opportunity during the trial scheduled on July 7, 2005. Accordingly,

IT IS ORDERED that a separate order will be issued by this Court denying Defendants' motion for summary judgment; overruling Defendants' objection that Plaintiffs' opposition to Defendants' motion was not timely filed; denying Defendants' motion to continue trial; and directing the parties to be prepared to commence trial of this action on **July 7, 2005, at 09:00 a.m.**, or as soon thereafter as counsel can be heard, in the BANKRUPTCY COURTROOM, RUSSELL SMITH COURTHOUSE, 201 EAST BROADWAY, MISSOULA, MONTANA pursuant to the pretrial scheduling order issued on April 20, 2005.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana